

No. 2597

8

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK CRESTA, et al.,
Petitioners,

vs.

T. V. MAXWELL, et al.,
Respondents.

In the Matter of the Estate of
DOMINGO GHIRADELLI, et al.,
Bankrupts.

PETITION FOR REVISION

To Revise, in Matter of Law, Certain Order of United
States District Court for the Northern
District of California.

BRIEF FOR PETITIONERS

T. Z. BLAKEMAN,
Attorney for Petitioners.

Filed

OCT 21 1915



No. 2597

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK CRESTA, et al.,

Petitioners,

vs.

T. V. MAXWELL and J. L. RADOVICH, As-
signees of D. GHIRADELLI, et al., Bankrupts.

STATEMENT OF THE CASE FOR PETITIONERS

This is a Petition for Revision under Section 24b of the Bankruptcy Act, to revise in Matter of Law a certain order of the District Court of the United States for the Northern District of California, First Division, made in the bankruptcy proceedings in the Matter of the Estate of D. Ghiradelli, et al., bankrupts.

The Petitioners, Frank Cresta, et al., presented their petition for relief in the Matter of said bankrupts' estate, to said District Court, May 1st, 1914. Record pp. 12-19. The said assignees filed their answer to said petition May 11th, 1914. Record pp. 19-26.

The Matter of said Petition was then by said District Court referred to A. B. Krept, Register in Bankruptcy, for report thereon. The Petitioners, before the Referee, demurred generally to the answer of the assignees. Record pp. 26-27.

The Referee overruled the demurrer, and thereupon the matter was submitted to the said Referee upon the facts stated in the said petition and answer.

The Referee made his report to the said District Court February 4th, 1915. Record pp. 27-30. The report of the Referee was adverse to the Petitioners.

The Petitioners filed objections to said report of the Referee. Record pp. 30-31. (These objections are *erroneously entitled* in the Record).

The District Court confirmed the said report of the Referee March 26th, 1915. Record p. 32.

The Petitioners excepted to said action of the District Court, and on April 5th, 1915, made, and served, and filed in this Court their Petition for Revision. Record pp. 1-7.

The Petition for Revision sets forth the main facts alleged in the Petition for Relief filed as aforesaid in the District Court, and the other pleadings and acts of Court and Referee as aforesaid.

The Referee states in his report, Record p. 28: "In regard to the petition of Catherina Polostrini, " et al. (same as Frank Cresta, et al.), the facts

“are sufficiently set forth in the petition and the
“answer filed thereto by the assignees.”

The Facts:

We state here the material facts from the said petition and answer:

D. Ghiradelli and A. Mangini, partners, were duly adjudged bankrupts under the Bankrupt Act of 1867 shortly before its repeal.

The said bankrupts' estate is still in process of settlement.

One Tomaso Cresta was a creditor of said bankrupt copartnership and duly proved his claim in the sum of \$1,050, and during his lifetime collected the first dividend declared. The said Tomaso Cresta *died December, 1890*, while a resident of San Francisco, and his estate was duly administered and finally settled and distributed by the Superior Court for the said City and County of San Francisco before another dividend was declared in the estate of said bankrupts.

Decree of final distribution of the estate of said Tomaso Cresta, deceased, was made and entered by said Superior Court *September 24, 1900*, whereby all the remainder of said estate was distributed to the petitioners herein and one Joseph Cresta as the devisees and heirs of said Tomaso Cresta, deceased. Record pp. 14-15.

The next dividend, to wit: Dividend No. 2 was declared in said bankrupts' estate *August 31st, 1910*, and the amount thereof applicable to the said claim of said Tomaso Cresta was the sum of \$252.

Neither the Register in bankruptcy, nor the assignees of said bankrupts, took any notice of the death of said Tomaso Cresta, but his name was put upon the dividend sheet as if he were alive and the assignees of said bankrupt estate, to wit: the respondents herein, issued their check payable to the order of Tomaso Cresta for the \$252.

Dividend No. 3 was declared in *May, 1911*, and the said assignees likewise issued their check payable to the order of Tomaso Cresta for the sum of \$78.75, the amount applicable to the claim proved by Tomaso Cresta in his lifetime.

It is alleged by the petitioners that the assignees "carelessly and wrongfully and without proper care or inquiry delivered said checks to a person or persons not entitled thereto." (Record pp. 16-17). The assignees, however, "deny that the checks were carelessly or without sufficient precaution or inquiry delivered to any party not entitled thereto." (Record p. 25). After having stated to whom they were delivered. (See the facts stated in the answer below).

The following further allegations of the petitioners, not being denied, must be regarded as facts, to wit:

Petitioners state upon their information and belief that said Joseph Cresta was the party who received the money on the said two checks. That said Joseph Cresta diedday of September, 1912, and that petitioners had no information or knowledge that said Tomaso Cresta had been a creditor of said bankrupts, or that any dividend or dividends had been declared in his favor or checks issued therefor as aforesaid until after the date of the death aforesaid of said Joseph Cresta. Record p. 17.

Material facts stated in the answer of the assignees. The assignees allege:

That the matter of the estate of the bankrupts is pending in this (United States District Court) court by authority of an Act of Congress enacted in 1868;

That Milton J. Green was, on 31st of August, 1910, the duly appointed Register in Bankruptcy in the above-entitled matter;

That on said day a dividend of 24 per cent was declared at a meeting of the creditors of said bankrupts and approved by the Register;

That it was the duty of the Register to make a memorandum in a book kept for that purpose, of the dividend payable to each and every creditor of said bankrupts as they appear of record in said matter;

That on said 31st day of August, 1910, said Register made up said dividend book and there appeared in said book as No. 59, Cresta, Tomaso, San Francisco, amount allowed \$1,050, dividend 24 per cent, \$252;

That it was the duty of the said assignees, on receipt of said book from the Register, to pay said dividends by drawing a check in favor of the claimant on The Bank of California, the depository of all funds in their hands, for the amount of the dividend payable to such claimant;

That pursuant to said duty, check No. 59 was made payable to Tomaso Cresta for the sum of \$252, and duly signed by said assignees and countersigned by the Register;

That, as will appear by the records in this matter, a large proportion of said creditors employed attorneys at law to appear for and care for their legal rights;

That A. D. Splivalo, an attorney at law, appeared in open Court and at the hearings before the Register on several occasions as the attorney at law for said claimant, Tomaso Cresta, and for other creditors;

That when said dividend checks were ready for delivery to the various claimants, said A. D. Splivalo appeared at the office of Pringle & Pringle, the attorneys for said assignees, and said attorneys delivered said check No. 59, payable to Tomaso Cresta,

to said A. D. Splivalo as the attorney at law for Tomaso Cresta, taking Splivalo's receipt for said check;

That said check was paid by The Bank of California and thereafter returned to said assignees cancelled. Record pp. 19-21.

The answer states the same excuse for the declaring of the third dividend and the issuance of the check therefor for \$78.75. Record pp. 22-24. (The answer makes an evident mistake in stating that this latter dividend was declared and the check issued therefor on August 31st, 1910, the date of dividend No. 2 and check therefor. The Referee reports that the date of this latter check was May 11th, 1911. Record p. 28).

The allegation aforesaid of the answer that A. D. Splivalo appeared on several occasions as attorney for the claimant, Tomaso Cresta, cannot be taken to mean that said Splivalo had a warrant or power of attorney to act for said claimant as required by the Bankrupt Act and the rules thereunder, for the Referee reported that "no power of attorney is on file herein authorizing said Splivalo to receive payment of dividends payable to Tomaso Cresta." Record p. 29.

The answer further alleged that when the said check of the assignees for the \$252 was returned to them as paid by the said The Bank of California it bore endorsements as follows:

“Madalina Cresta (her mark), executrix of the estate of Tomaso Cresta, deceased. Witness A. D. Splivalo, M. J. Baggett,” also “all previous endorsements guaranteed pay to Crocker National Bank or order Banca Popolare Operaia Italiana.” (Record p. 21). And that when the check of the assignees for the other dividend No. 3 for \$78.75 was returned to them as paid and cancelled by said The Bank of California it bore endorsements as follows, to wit: “Tomaso Cresta by J. Cresta, assignee,” “A. D. Splivalo” and the bank endorsements aforesaid that were on the \$252 check. Attention is here called to the aforesaid allegation in the answer that the check of August 31st, 1910, for \$252 bore the endorsement “Madilina Cresta (her mark), executrix of the estate of Tomaso Cresta, deceased.”

Whereas, the petition alleged that Madelina Cresta was named in the will of said Tomaso Cresta as Executrix and that she was, by the order of the Court, probating said will, January 7th, 1891, appointed Executrix thereof, and that she remained such Executrix untilday of November, 1894, when she resigned as such Executrix, and that thereafter, on the 17th day of December, 1894, A. C. Freese, Public Administrator of said City and County of San Francisco, was appointed Administrator of the estate of said Tomaso Cresta, deceased, with the will annexed and that said Freese filed his final account as such Administrator with

petition for final distribution September 12th, 1900, and that by decree of said Court entered 24th September, 1900, said final account was settled and the remainder of said estate finally distributed. Record pp. 13-15. These allegations of the petition, and others not denied are admittedly true, and were so treated by the Referee.

The only *attempted* denial in the answer, except the denial of negligent delivery of the check, is as follows: Further answering said petition, the assignees allege that they have no information or belief upon the subject sufficient to enable them to answer, and placing their denial on that ground, they deny that the petitioners are the heirs of said Tomaso Cresta, or that Tomaso Cresta is dead, or that his will was probated in the City and County of San Francisco as set forth in said petition, or that said Tomaso Cresta left a last will. (Record p. 24). But an allegation in a complaint or petition of what purports to be of public record, cannot be denied for want of information or belief; besides, the Referee reported that the matter referred to him was "submitted upon *the facts stated* in the petition and the answer and the record on file in this matter." Record p. 28. The endorsement aforesaid on the check for \$252 indicates the death and last will.

Specification of Errors

relied upon by petitioners:

1. The Referee erred in overruling the demurrer of the petitioners to the answer of the respondents,

and the Court also therein erred in confirming the report of the Referee.

2. The Referee erred in holding that the "assignees could properly deliver a check drawn in the name of the claimant to an attorney at law who appeared in the proceedings stating that he represented the claimant.

3. The Referee erred in assuming that the assignees at the time of delivering said checks had no notice or knowledge of other claimants to said dividends.

4. The Referee erred in not holding that, at the date when said dividends were declared, the assignees were bound by the law to take notice of the fact that the claimant, Tomaso Cresta, was dead and that his estate had been settled in the proper Court and the remainder thereof distributed by the judgment of said Court to the persons named in said judgment as his heirs.

5. The Referee erred in not finding and reporting in favor of the petitioners in accord with their prayer.

6. The United States District Court in confirming the report of the Referee erred in each of the several particulars wherein it is hereinbefore alleged that said Referee erred.

7. The said Court erred in confirming the said report of the Referee.

8. The following are the objections, made and filed in said District Court, to the report of the said Referee, to wit:

1. The denial of the petition was against and contrary to the law;

2. The denial of said petition is in conflict with the facts in the record of the estate and case, and in conflict with and against the admitted facts as shown by the report of said Referee and the records of said estate;

3. That under the law and the facts as shown by said report of said Referee and the facts shown by the records of the estate and before the Court the said petitioners were and are entitled to an order upon the said assignees for the payment to petitioners of the claims made in their said petition.

9. The said District Court erred in not passing upon said objections and in confirming the report of the Referee.

Argument for the Petitioners

I.

The assignees illegally and wrongfully issued and delivered their said two checks payable to the order of the dead claimant.

This being true the dividends applicable to the claim proved by Tomaso Cresta, in his lifetime, are

still in the bankrupts' estate and subject to the claims of the petitioners, his heirs and distributors.

The petitioners are not attempting to have the assignees personally account for and pay to them the amount of said two checks, but are seeking to have the respondents, *as assignees* of the bankrupts' estate, pay them, as the heirs of the claimant and distributees of his estate, the dividends applicable to the claim of Tomaso Cresta since his death.

Tomaso Cresta proved his claim sometime before his death and collected the first dividend; thereafter, to wit: *December, 1890*, Tomaso Cresta died while a resident of the City and County of San Francisco, State of California. His will was duly probated January 7th, 1891, by the judgment of the Superior Court of said City and County, a Court of general jurisdiction.

The final account of the Administrator in said estate was by said Court duly settled *24th September, 1900*, and the remainder of said estate then by decree of final distribution by said Court distributed to the heirs of said decedent who are the petitioners, and Joseph Cresta. (Joseph Cresta is deceased and his interest is not represented here).

Ten years after said final settlement and distribution of the estate of said Tomaso Cresta, deceased, and twenty years after the death of Tomaso Cresta, another dividend was declared in the estate of said bankrupts, to wit: Said dividend No. 2. Cresta's

proved claim being entitled to \$252, and a year later another dividend was declared, \$78.75 being the portion thereof applicable to the claim of the deceased Cresta.

The assignees, when they issued their check for said respective sums payable to the order of Tomaso Cresta, *knew*, in contemplation of law, *that said Tomaso Cresta was dead and that his estate had been administered, finally settled and the remainder distributed to the petitioners herein.*

“The administration and distribution of the estate of a deceased person is a proceeding in rem and the action of the Court in making the distribution binds the whole world.”

The decrees of Courts having probate jurisdiction operate *in rem* and are binding and conclusive in all courts and places.

Crew vs. Pratt, 119 Cal. 139, at 150;

William Hill Co. vs. Lawlor, 116 Cal. 359;

Mulcahey vs. Dow, 131 Cal. 73;

State vs. McGlynn, 20 Cal. 235.

This latter case was reviewed by the Supreme Court of the United States in *Keily vs. McGlynn*, 21 Wall. 503, and the ruling of the California Supreme Court approved.

State vs. McGlynn and *Keily vs. McGlynn*, *supra*, involve two phases of the long contest over the will and estate of David C. Broderick, deceased.

The United States Supreme Court at the beginning of its decision in the latter case, *supra*, stated the rule as established both in England and this country, "that Courts of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof, and stated the reason of the rule, to wit:

"The constitution of a succession to a deceased persons estate partakes in some degree of the nature of a proceeding *in rem* in which all persons in the world, who have an interest, are concluded as upon *res adjudicata* by the decision of the court having jurisdiction."

In *Davis vs. Gains*, 104 U. S. 386, at 392-393, the Court quoted from the opinion in the former case of *Grignon vs. Astor*, 2 How. 319, when a sale of real estate under order of sale by a Probate Court was contested, as follows:

"The sale is a proceeding *in rem* to which all claiming under the intestate are parties."

The Court in *Davis vs. Gains* quoted with approval the ruling of the Court of Appeals of Virginia in *Ballows vs. Hudson*, 13 Gratt 672, as follows:

"A judgment of the Probate Court is classed among those which in legal nomenclature are called judgments *in rem*. Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons and all other courts."

These authorities established, conclusively, that the Register in bankruptcy in the matter of the estate of said bankrupts and the said assignees, of said bankrupts at the time said dividends were declared and said checks issued, had notice of the death of Tomaso Cresta and of the proceedings in the Probate Court which resulted in the settlement and final distribution of his estate. They were interested in the decedent's estate, holding possession of the proportion of the bankrupts' estate, to which the claim proved by Cresta in his lifetime was entitled; and thus *they were as effectually bound by the decree of final distribution entered by the said Probate Court* in the matter of the estate of said Tomaso Cresta, deceased, as if they had actually entered their appearance in said proceeding.

Therefore, neither the placing of the name of Tomaso Cresta on the dividend sheets, nor the issuance and delivery of checks in his name long after his death and the distribution of the remainder of his estate to the petitioners herein, could conclude or affect the rights of petitioners under said decree of final distribution.

II.

If the claimant, Tomaso Cresta, had been alive when the dividends were declared and the checks therefor made in his name, *the delivery of the checks as alleged in the answer of the assignees, would not have bound or concluded the said creditor.*

The checks issued by the assignees in the name of Tomaso Cresta were delivered to one A. D. Splivalo, an attorney-at-law, and the excuse of the assignees for such delivery is that said "Splivalo appeared in open Court and at hearings before the Register on several occasions as the attorney-at-law for said claimant, Tomaso Cresta, and for other creditors; that when said dividend checks were ready for delivery said Splivalo appeared at the office of Pringle & Pringle, the attorneys for said assignees, and said attorneys delivered said check to said Splivalo as the attorney-at-law for Tomaso Cresta." Record p. 21 and p. 23.

The answer does not allege when said Splivalo had appeared as attorney-at-law for Tomaso Cresta, presumably, however, before Cresta's death, twenty years before the checks were delivered. The answer does not allege that Splivalo held a warrant or power of attorney to so act, or to act at all for Cresta. If he had, Cresta's death revoked it.

But the Referee reported that "no power of attorney is on file herein authorizing said Splivalo to receive payment of dividends payable to Tomaso Cresta." Record p. 29.

The Bankruptcy Act of 1867 provided that "Any creditor may act at all meetings by his duly constituted attorney the same as though personally present." Loveland on Bankruptcy, p. 1230. This provision of the law would prevent an attorney-at-

law, as such, from receiving or collecting any dividends.

When the dividends in question were declared and the checks delivered (August 1910 and May 1911) the Bankrupt Act of 1898 was in force, the Act of 1867 having been repealed in 1880.

Trustees under the Act of 1898 had duties similar to those of assignees under the Act of 1867. The estate originating under the old act, are managed and distributed by the Courts acting under present rules, and the assignees in old holdover estates, it seems, would have to conform to the provisions of the recent Act and the general orders made by the Supreme Court.

Therefore, we submit that the following authorities are applicable and govern the acts of assignees of an old estate, performed or to be performed since the Act of 1898 and the general orders therein provided for took effect.

“Checks should always run to and be mailed or delivered to the creditors *unless the power of attorney specifically* authorizes the attorney to receive and receipt therefor.”

Collier on Bankruptcy, p. 393.

General Order XXI, Sub. 5, provides how the execution of any letter of attorney to represent a creditor may be acknowledged or proved.

“An attorney-at-law cannot vote at a creditors’ meeting without producing a letter of attorney from the creditor.”

Loveland, p. 269, Sec. 105 and cases cited, including *in re Lazons*, 120 Fed. 716.

“The trustee should forthwith (on declaration of dividend) give notice to creditors when and where a check or warrant for dividends may be obtained. If the creditor cannot personally attend, the warrant may be delivered to a person authorized in writing to receive it.”

Loveland on Bankruptcy, p. 732 and pp. 854-5.

The assignees were clearly without even a semblance of authority for delivering the checks to Splivalo.

III.

Attention is called to the endorsements on the checks as disclosed by the assignees’ answer. The check for \$252, issued in name of Tomaso Cresta and dated August 31st, 1910, when returned to the assignees as paid and cancelled, bore the endorsement: “Madalina Cresta (her mark) Executrix of the Estate of Tomaso Cresta, deceased.” Record p. 21. Here was direct personal notice to the assignees that Tomaso Cresta was dead and that Madalina Cresta assumed, at least, to act as Executrix of his estate. They were thus by direct notice put upon inquiry whether Madalina Cresta was the Executrix of said decedent’s estate. Inquiry would have shown the assignees personally that which they

already in contemplation of law, knew. (See Point II, *supra*, to wit: That Madalina Cresta had resigned as Executrix sixteen years before the date of the check and had been succeeded by A. C. Freese, who had ten years before the date of the check closed said estate with final decree of distribution in favor of petitioners.

The check of May 11th, 1911, for \$78.75, when returned to the assignees as paid and cancelled, bore the endorsement: "Tomaso Cresta, by J. Cresta, assignee."

And this was another notice to the assignees of something wrong, and if they had followed it up they could probably have recovered the money that they had negligently and illegally afforded a person other than the rightful parties to receive money belonging to the estate of the bankrupts.

It will be for the creditors, of said bankrupts, at some future meeting to determine whether the said assignees shall be required to reimburse the said estate for the amount of the said two checks illegally issued and delivered to person not entitled.

The petitioners herein seek their proportion of the assets of said bankrupts' estate, applicable to the claim of Tomaso Cresta since his death.

Respectfully submitted,

T. Z. BLAKEMAN,

Attorney for Petitioners.

